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No.

In The

Supreme Court of the United States

October Term, 1995

ROBERT J. FLUEHR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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89 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the lower court erred in automatically increasing the offense level for knowledge of specified proceeds under United States Sentencing Guidelines ("U.S.S.G.") § 2S1.2(b)(1)(B), based solely upon Petititoner's plea of guilty to 18 U.S.C. § 1957, where the court held that, as a matter of law, it was impossible to determine the source of the funds.

II. Whether the lower court erred in failing to distinguish between U.S.S.G. § 2S1.1 and § 2S1.2 for purposes of determining the value of the funds under the United States Sentencing Guidelines.

III. Whether the lower court erred in increasing the offense level pursuant to U.S.S.G. § 3B1.3 for abuse of a position of trust where the government failed to prove that Petitioner occupied a position of trust with the victims.

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OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on December 7, 1995. (Appendix 1a-3a). The Third Circuit affirmed the final Judgment of Conviction of the district court for the Eastern District of Pennsylvania (Criminal No. 93-00376-01), entered on March 21, 1995 (Appendix 4a-11a), and the decisions of the district court of January 27, 1995 (Appendix 21a-37a) and March 14, 1995. (Appendix 12a-20a). The instant petition for a writ of certiorari was filed within ninety (90) days of the date of the court of appeals' decision.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to § 1254(a) of Title 28 of the United States Code, 28 U.S.C. § 1254(a).

STATUTES INVOLVED

United States Sentencing Guidelines ("U.S.S.G.") Sections:

U.S.S.G. § 2S1.1 (Appendix 38a-41a)

U.S.S.G. § 2S1.2 (Appendix 41a-43a)

U.S.S.G. § 3B1.3 (Appendix 43a)

United States Code Sections:

18 U.S.C. §1956 (Appendix 43a-55a)

18 U.S.C. §1957 (Appendix 55a-57a)

STATEMENT OF THE CASE

A. Procedural History

An indictment was filed in the United States District Court for the Eastern District of Pennsylvania, charging the Petitioner Robert Fluehr and co-defendant Louis Silver in Counts 1 through 211 with mail fraud, in violation of 18 U.S.C. § 1341 and § 2 and charging Petitioner Fluehr in Counts 212 through 238 with engaging in monetary transactions in property derived from specified unlawful activity in violation of 18 U.S.C. § 1957 and § 2. Petitioner Fluehr, upon the advice of his then existing counsel, Robert Madden, Esquire, pled guilty to all counts of the Indictment. No plea agreement was entered into.

On March 17, 1995, Petitioner was sentenced to a term of imprisonment of 33 months and a special assessment of $11,900.00. (4a-11a). The district court applied the money laundering guidelines pursuant to U.S.S.G. § 2S1.2 in finding a total offense level of 21 and departed one level each for lack of moral culpability and extraordinary acceptance of responsibility, respectively. In applying the money laundering guidelines, the district court included the total amount of loss charged in the indictment without deduction for amounts paid for legitimate expenses which were transferred in the ordinary course of business, pursuant to business practice established over the previous thirteen years. The district court further increased the offense level for knowledge of specified proceeds pursuant to U.S.S.G. § 2S1.2(b)(1)(B) despite the fact that it expressly found that it was impossible to determine how much of the transferred funds originated from legitimate or tainted monies. Lastly, the district court increased the offense level pursuant to U.S.S.G. § 3B1.3 for abuse of a position of trust despite the fact that the government failed to prove that Petitioner occupied a position of trust with the victims.

The Third Circuit Court of Appeals affirmed the judgment of sentence of the district court without any opinion.

B. Factual History

In 1980, Petitioner Robert Fluehr established Universal Health Management, Inc. (hereinafter "Universal"), a business engaged in providing insurance brokering and the administration of group health benefits. Universal was a wholly owned subsidiary of Execucomp, Inc. Over the years, Universal provided psychological, podiatry, prescription, dental, vision, life and physical fitness plans to numerous groups. Petitioner was the President of Universal.

In June of 1992, co-defendant Louis Silver, of The Silver Group, introduced Petitioner Fluehr to representatives of The Wholesale Seafood Dealers of Philadelphia (hereinafter "Seafood Workers") who advised that they were looking for new providers for insurance. Prior to this time, Universal did not service large scale medical plans for groups the size of the Seafood Workers. The Seafood Workers represented twelve companies engaged in the seafood business at the food distribution center in South Philadelphia, all of whom had collective bargaining agreements with Local 56. The representatives of the Seafood Workers advised that they were seeking to match the benefits previously provided by the Health and Welfare Fund of Local 56 for hospitalization, surgical, major medical, life, disability, dental, prescription, vision, and drug and alcohol.

An agreement was signed on July 16, 1992, between a representative of the Seafood Workers and Universal representing that the aforementioned insurances would be provided at specified rates. The medical coverage was to be supplied through Blue Cross and Blue Shield. Pursuant to the

agreement, effective July 1, 1992, checks were made payable to Universal. Subsequently, co-defendant Louis Silver negotiated and entered into the another agreement with the George L. Wells Meat Company, which was effective November 1, 1992, and it was not until approximately January of 1993 that Petitioner Fluehr ever met any representative of that company.

All of the insurances other than hospitalization surgical, and major medical, which were contracted for pursuant to the agreements were obtained by Petitioner Fluehr and provided on a timely basis. The total amount of premiums allocatable to these insurances is $124,283.00.

Following Petitioner Fluehr's initial meeting with representatives of the Seafood workers in June of 1992, he entered into negotiations with Blue Cross and was given estimated quotes upon which Petitioner Fluehr based the premiums set forth in his agreement with the Seafood workers. However, the final quotes from Blue Cross far exceeded the rates originally anticipated. Petitioner was advised that the rates would be lower if each individual company which comprised the Seafood Workers obtained individual contracts with Blue Cross and Blue Shield and individual applications were then processed, but were eventually rejected. Tragically[1], rather than simply advise the Seafood Workers that the medical coverage had not been secured, Petitioner Fluehr submitted and resubmitted applications for coverage, contacting thirteen other agents or insurers, in an effort to place the insurance. For a multitude of reasons, *i.e.* age and past medical histories, high percentage of family subscribers, pre-existing conditions, incomplete information on subscriber applications, etc. the

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1. Contemporaneous with these events Petitioner experienced a series of catastrophic personal tragedies, one of which was the diagnosis of his son's cancer and subsequent surgery and treatment.

applications were rejected. In February of 1992, however, Petitioner Fluehr was able to obtain coverage, effective February 1, 1992. Premiums in the amount of $52,033.65 were paid by Wells Meats to Universal between February through May of 1993 and this coverage was provided. Finally, in March of 1993, Petitioner Fluehr was partially successful in obtaining hospitalization coverage, effective April 1, 1993 for a large percentage of the Seafood Workers' employees. The premiums were paid and the employees received hospitalization coverage.

In summary, it was during the period of time from July of 1992 through May of 1993, that Petitioner Fluehr failed to advise the Seafood Workers that he had not obtained the necessary medical coverage. Foolishly and tragically, he did not want to admit failure and he continued on in his belief and hope that he would be able to place the insurance. When the claims began to come in, he paid the claims with the money that Universal had collected in premiums because he felt that it was his "obligation". Before he even learned of an investigation, he had already paid out $311,345.76 in claims, and as of the date of the indictment, he had paid out a total of $343, 245.89. In addition, as of the date of the sentencing hearing, he had made payment of an additional $89,419.22 in restitution to the Seafood Workers. There is no allegation that any of the premiums were converted to Petitioner's own use. The district court found that "... defendant did not embark on his relationship with the employees with an intent to defraud them and he intended to obtain insurance for them." (33a).

C. An Overview of the Financial Transactions During the Indictment Period

The testimony of Ms. Linda Kuepper who was employed by Universal for the thirteen years prior to the indictment demonstrated that in the ordinary course of business, all

premiums received by Universal from all of its clients were initially deposited in the Universal General Checking Account. From that account, monies were subsequently dispersed to other checking accounts and related entities, according to need and purpose. For example, funds would be transferred to the Universal's Claims Checking Account for the payment of health care providers' claims and other funds would be transferred to Execucomp, Inc.'s checking account for the payment of operational expenses such as rent, payroll, utilities, etc. Exhibit 1 (58a) sets forth the total amount of money deposited in Universal General's checking account during the indictment period. The total receipts were $1,140,716.31. Of those deposits, $540,361.38 represents the premiums paid by the Seafood Workers. The remaining $600,000 represents premiums paid by other clients of Universal as to which there is no claim of impropriety.

The amounts set forth in Exhibit 4 (59a), are the amounts set forth in the money laundering counts of the Indictment; the total amount charged and the total amount of loss upon which Petitioner was sentenced was $505,650. These transactions simply represent transfers in excess of $10,000 out of the Universal General Account and the government does not even purport to claim that all of these funds represent fraudulent transfers. Even the district court acknowledged that "it is impossible to know how much of any transfer out of the general account was of tainted funds." (35a-36a). The testimony confirmed that Exhibit 5, (60a) "Summary and Analysis of 'Money Laundering' Transfers" sets forth the charged money laundering transfers and the simultaneous deposits into other related accounts of Universal. Other trial exhibits reconcile the Time for Tots and Physical Fitness accounts and show that more money was deposited into the Universal General checking account than was withdrawn, The physical fitness benefit was a benefit provided to the Fraternal Order of Police. Members were

billed monthly, the amounts were deposited in the Universal General Account, the administrative fee was subtracted and remained in Universal General, and the remaining balance was transferred to the physical fitness checking account for the payment of fees and expenses related to the benefits provided. As to these transfers there is no allegation of impropriety. Nonetheless, these amounts were included in the total amount of loss for purposes of determining Petitioner's sentence. It is further undisputed that $124,283 was transferred to the Universal Claims Account for the payment of premiums for insurances provided (*i.e.* dental, vision, life, etc.) and $187,062.76 was transferred for the payment of uninsured medical claims of the employees (19a). All of these amounts were included for purposes of determining the amount of loss under U.S.S.G. § 2S1.2.

REASONS FOR GRANTING THE WRIT

I.

PRELIMINARY STATEMENT

This Court's Rule 10 considerations here applicable are that the district court and the court of appeals have rendered a decision on important questions of federal law in conflict with decisions of other federal courts of appeals and, further, and the Third Circuit Court of Appeals has sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. This case presents an issue which has not been, and should be settled by this Court. For these reasons, a writ of certiorari should issue to review the judgment of the court of appeals.

II.

THE DECISION OF THE COURTS BELOW, TO AUTOMATICALLY INCREASE THE OFFENSE LEVEL UNDER U.S.S.G. § 2S1.2(b)(1)(B), SOLELY BECAUSE OF A PLEA OF GUILTY TO 18 U.S.C. § 1957 REPRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN DECIDED BY THIS COURT. FURTHER, THE DECISION OF THE COURTS BELOW REPRESENTS SUCH A DEPARTURE SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

The divergent levels of knowledge and intent required for conviction under 18 U.S.C. § 1957 (money laundering) and sentencing under U.S.S.G. § 2S1.2(b)(1)(B), represents an important question of federal law which has not yet been decided by this Court, but should be due to the proliferation of money laundering cases being prosecuted nationwide. Under 18 U.S.C. § 1957 the requisite scienter requirement is that the defendant know that the funds are "criminally derived property." Knowledge that the property is from a specified unlawful activity is not an element of the offense, however, it is the basis for a two level increase under U.S.S.G. § 2S1.2(b)(1)(B). *See* Commentary, Background, U.S.S.G. § 2S1.2 (1995 Edition) (42a-43a). This extremely esoteric distinction is an issue which has not yet been decided by this Court.

The case at bar is a prime example of the distinction between the requisite knowledge that the funds are "criminally derived property" (sufficient for a conviction under 18 U.S.C. § 1957) and knowledge that the property is from a "specified unlawful activity" (to qualify for a two-point increase under U.S.S.G. § 2S1.2(b)(1)(B)). It is undisputed that the $505,650 charged in the money laundering counts is not traceable to the Seafood

Worker's premiums (the underlying mail fraud) and the government does not contend that it is. That is true because at least $600,000 of the $1,140,716.31 deposited in the Universal General Account were proceeds of legitimate business which were deposited according to customary business practice over the preceding thirteen years and as to which there is no claim of impropriety. Accordingly, the lower court held that:

> Because the tainted and untainted funds were commingled it is impossible to know how much of any transfer out of the general account was of tainted funds.
>
> The evidence presented indicates that it was the usual business practice of UHM to deposit all money received, regardless of source, into the general account and that, therefore, the commingling of the tainted and untainted funds was not done with the intent to disguise how much of each transfer out of the general account consisted of tainted funds.

(35a-36a). Nonetheless, the district court failed to understand that there is any distinction at all between the requisite knowledge that the funds are criminally derived under 18 U.S.C. §1957 and knowledge of "specified unlawful activity" under U.S.S.G. § 2S1.2(b)(1)(B). The district court concluded:

> Defendant pled guilty to § 1957 one element of which is knowledge that the funds were proceeds of unlawful activity and the only unlawful activity which the defendant was conducting at the time was mail fraud in violation of 18 U.S.C. § 1341. This is

> knowledge that each transfer consisted of proceeds from the mail fraud.

(31a-32a). Following this reasoning, one would have to commit multiple frauds in order to be exempt from the two-level increase under U.S.S.G. § 2S1.2(b)(1)(B) for knowledge of "specified unlawful activity." The Third Circuit affirmed this decision without explanation.

If ever there were a case that did not merit an enhancement under U.S.S.G. § 2S1.2(b)(1)(B), it would be this case. The lower court clearly found that it would have been impossible for Mr. Fluehr to have known the specific source of any of the amounts charged as part of the money laundering counts and that Petitioner demonstrated a "lack of intent to disguise." (35a-36a). If it were Congress' intent that by reason of a conviction under this section, every person convicted under this section knew that the funds were the proceeds of specified unlawful activity, there would be no need for a separate enhancement under U.S.S.G. § 2S1.2(b)(1)(B). As the Tenth Circuit in *United States v. Brunson,* 54 3d 673, 678 (10th Cir. 1995) stated with respect to an enhancement under U.S.S.G. § 3B1.3, "the fact that this is an enhancement provision by definition means that it is not intended to be applied in every case of fraud." Given that Congress intended that there be an additional finding of knowledge of "specified unlawful activity" prior to the imposition of a two-level increase under U.S.S.G. § 2S1.2(b)(1)(B), the lower court's decision is erroneous as a matter of law.

Moreover, the district court's conclusion that because Petitioner pled guilty to mail fraud he had knowledge of specified proceeds is erroneous for yet another reason, as it takes knowledge at the time of sentencing and relates it back to the time of the occurrence of the offense. Certainly, a defendant's

subsequent conduct in pleading guilty upon the advice of counsel cannot be construed as knowledge, at the relevant time, of specified unlawful proceeds. Furthermore, the lower court could not possibly mean to suggest that a different result would be appropriate if Petitioner had wasted the court's resources and gone through a lengthy trial.

For all of the preceding reasons, it is respectfully submitted that the decision of the Third Circuit to affirm the decision of the lower court to increase Petitioner's offense level by two points under U.S.S.G. § 2S1.2(b)(1)(B) must be reviewed by this Court as it sanctions a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power. In addition, the issue of automatic enhancements presents an important question of federal law that has not been, but should be, settled by this Court.

III.

THE DECISION OF THE COURTS BELOW TO INCREASE THE OFFENSE LEVEL UNDER U.S.S.G. § 3B1.3 FOR ABUSE OF A POSITION OF TRUST IS IN CONFLICT WITH THE DECISIONS OF NUMEROUS OTHER UNITED STATES COURTS OF APPEAL.

The district court erroneously increased Petitioner's offense level under U.S.S.G. § 3B1.3 for Abuse of a Position of Trust, without any factual findings to support this conclusion (32a) and the Third Circuit Court of Appeals affirmed without any explanation. It is undisputed that Petitioner had no special relationship with the victims other than a commercial one as an insurance broker.[2] Accordingly, the decision of the Third Circuit

2. It is further undisputed that Petitioner did not even know any of the individuals for whom he obtained the insurance. Rather, it was codefendant (Cont'd)

Court of Appeals is in conflict with numerous other United States Courts of Appeal as well as its own prior decisions, as will be more fully set forth below.

The government, Respondent herein, contends that Petitioner Fluehr abused his position of trust as President of Universal to commit the fraud Petitioner Fluehr occupied a relationship of trust vis a vis Universal (the insurance company); Universal, however, is not the victim in this case. The Fourth Circuit Court of Appeals In *United States v. Moore*, 29 F.3d 175 (4th Cir. 1994), citing numerous circuit court rulings, held that it is the defendant's relationship with the *victims* which is relevant, rather than the defendant's position of trust in his company[3]:

> ... The government contends that the enhancement was appropriate here because Rawlins and Moore abused their positions of trust at Graphic Image and Graphic Color Prep in order to carry out the fraudulent invoice scheme.
>
> Again, we disagree. It is well-established that "the question of whether an individual occupies a position of trust should be

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(Cont'd)
Silver who had a personal relationship with the various groups whom he introduced to petitioner for the purpose of obtaining insurance, and in the case of the George L. Wells Meat Company, petitioner did not even negotiate the contract.

3. In *Moore*, the defendants were owners and one defendant was the president of a company which engaged in fraudulent billing practices totalling over a million dollars. The defendants pled guilty to mail fraud and conspiracy and the government dismissed the money laundering counts of the indictment.

> addressed from the perspective of the victim." *Queen*, 4 3d at 929; *see also United States v. __*, 996 F.2d 1395, 1396 (2d Cir. 1993); *United States v. Hill*, 915 F.2d 502, 506 n. 3 (9th Cir. 1990). There must be "a trust relationship between [the defendant] and his victim" for the enhancement to apply. *See United States v. Hickman*, 991 F.2d 1110, 1112 (3d Cir. 1993). Here, the fact that Rawlins and Moore may have occupied positions of trust at Graphic Image and Graphic Color Prep does not govern our § 3B1.3 analysis because Knight Publishing, not Graphic entities, was the victim in this case.

Ibid., at 179, footnote omitted. The *Moore* case is precisely analogous to the case at bar because the victims in this case were the employees of the Seafood Workers rather than Universal, the entity with which Petitioner had a relationship of trust.[4] *See also United States v. Christie*, 43 F.3d 1480 (9th Cir. 1994); *United States v. Mullens*, 65 F.3d 1560, 1566 (11th Cir. 1995). Further, even if the government could prove that codefendant Silver enjoyed a position of trust with respect to the victims[5], "the

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4. In *Moore*, the court of appeals noted that although the government argued that the companies with which the appellant enjoyed a position of trust were "secondary victims", no such evidence was presented and the presentence report, which the district court adopted, identified only the defrauded company as the victim. 29 F. 3d. 179, n. 2. The case at bar is identical — no such evidence was presented and the presentence report does not identify Universal as a victim.

5. Arguably, co-defendant Louis Silver may have had a special relationship with the Seafood Workers because it was he who brought them to

(Cont'd)

Pinkerton principle of § 1B1.3, does not apply to the abuse of trust provision in § 3B1.3." *Moore, Ibid.*, at 178. Therefore, Petitioner Fluehr could not be held accountable under this section for codefendant Silver's status.

Moreover, the relationship between Petitioner Fluehr and the victims here was merely a commercial relationship rather than a fiduciary one and a number of circuit courts of appeal have held that "ordinary commercial relationships do not constitute a trust relationship sufficient to invoke the § 3B1.3 enhancement." *United States v. Waters*, 61 F.3d 902 (4th Cir. 1995); *United States v. Brunson*, 54 F.3d 673, 677-678 (10th Cir. 1995); *United States v. Brow*[illegible] 47 F.3d 198, 205 (7th Cir 1995); *United States v. Moore*, 29 F.3d at 179-180. As such, the lower court's conclusion that appellant abused a position of trust is in conflict with the decisions of numerous other United States Courts of Appeal.

The Tenth Circuit Court of Appeals in *Brunson*, has explained:

> Unlike a personal investment advisor/ investor relationship, in an ostensibly normal arms-length commercial relationship such as this one, no trust relationship exists between the two principals. The guideline enhancement requires more than a mere showing that the victim had confidence in the defendant. Something more akin to a fiduciary function is required.

Brunson, supra. at 677.

(Cont'd)

Universal. The victims and Petitioner, Fluehr, however, were unknown to one another until codefendant Silver introduced them. When Wells Meats entered into its agreement, all of the negotiations had been with co-defendant Silver and it was not until January of 1993 that Petitioner was even introduced.

The *Brunson* Court explained:

> In the typical case where Sec. 3B1.3 applies, the victim is a business and the defendant is an employee who has taken advantage of the knowledge and responsibilities acquired by virtue of his or her position within the company to embezzle or otherwise steal from the company. Their "position of trust must have contributed in some significant way to facilitating the commission or concealment of the defense (sic) (e.g., by making detection of the offense or the defendant's responsibility for the offense more difficult.)" U.S.S.G. § 3B1.3 cmt. 1; *see, e.g., United States v. Johnson*, 4 F.3d 904 (10th Cir. 1993), *cert. denied*, __U.S.__, 114 S. Ct. 1082, 127 L. Ed. 2d 398 (1994) (bank vault teller conspired with others to rob bank vault using knowledge of security procedures to avoid detection); *United States v. Fox*, 999 F.2d 483 (10th Cir. 1993) (credit card company employee issued card to herself under another person's account, made charges, them covered up delinquency on computer); *United States v. Levy*, 992 F.2d 1081 (10th Cir. 1993) (president of bankrupt company embezzled funds, defrauding trustee and creditors); *United States v. Chimal*, 976 F.2d 608 (10th Cir. 1992), *cert. denied*, __U.S.__, 113 S. Ct. 1331, 122 L. Ed. 2d 715 (1993) (embezzlement by company controller); *United States v. Williams*, 966 F.2d 555 (10th Cir. 1992) (embezzlement by military pay accountant). Clearly, this case does not fall into this category.

> As the application note to § 3B1.3 indicates, the other type of case where an enhancement under § 3B1.3 is proper is where a fiduciary or personal trust relationship exists. For example, in *United States v. Queen*, 4 F.3d 925 (10th Cir. 1993), *cert. denied*, __U.S.__, 114 S. Ct. 1230, 127 L. Ed. 2d 575 (1994), we upheld an enhancement for the president of a company who had claimed to be an investment advisor/broker and had solicited funds which he had diverted for his personal use. He covered up his diversion by sending phony profit statements to the investors. Clearly, his position provided him with "the freedom to commit a difficult to detect wrong," one of the essential factors in the test for abuse of trust. *United States v. Williams*, 966 F.2d at 557. Furthermore, the district court had specifically found that a fiduciary relationship existed between the defendant and his "clients." *Id.* at 927. Similarly, in *United States v. Lowder*, 5 F.3d 467 (10th Cir. 1993), an accountant personally solicited investments from his tax clients, fraudulently promising them a guaranteed twelve percent return; the funds he then diverted to his personal use. As president of the company, he was able to dispose of the investors' money without oversight. These cases are closer to the case at bar in that they involve presidents of companies who defrauded others. Despite this similarity, these cases do not support an "abuse of trust" enhancement for Mr. Brunson.

Ibid., at 677-678.

Lastly, the trial court never addressed the issue of the use of a "special skill" under U.S.S.G. § 3B1.3 and there was no evidence presented by the government to show what skill requirements Petitioner was required to have met to obtain an insurance license and how that "special skill", if any were to exist, was used to actually commit or conceal the crime. Petitioner did not use any special skills to commit or conceal the crime; he simply failed to obtain the insurance contracted for. This crime was not particularly hard to detect, because the evidence showed that the employees of the Seafood Workers were complaining that the medical bills were not being paid , and a simple telephone call to Blue Cross and Blue Shield would have confirmed this. As the Tenth Circuit in *United States v. Brunson*, 54 F.3d 673,677 (10th Cir. 1995) noted in finding that when the president of a construction company failed to build a brick plant which was contracted for, his position as president did not provide him with the "freedom to commit difficult-to-detect wrongs," as ". . . even relatively unsophisticated businessmen . . . would undoubtedly detect that no brick plant was built." The Third Circuit in *United States v. Hickman*, 991 F.2d 1110, 1112-1113 (3d Cir. 1993), in holding that an enhancement under U.S.S.G. § 3B1.3 for a general contractor who fraudulently took advantage of the trust engendered in the business-client relationship to steal the client's funds, constituted reversible error, conclusively established the requisite criteria to qualify for an enhancement under U.S.S.G. § 3B1.3:

> At all events, to qualify under the guidelines, *the special skill must, at a minimum, be used actually to commit or conceal the crime, rather than merely to establish trust in a victim upon whom the defendant then perpetrates a garden variety fraud.* The case law has generally involved a direct use of a special skill. *See, e.g., United States v. Aubin,*

> 961 F.2d 980, 984 (1st Cir.) (defendant's special training in the repair of ATM machines gave him the knowledge to cause a malfunction that would require servicing so that he could enter the ATM, deactivate its alarms, and then locate and obtain the money), *cert. denied*, 113 S. Ct. 248 (1992); *United States v. Fairchild*, 940 F.2d 261, 266 (7th Cir. 1991) (defendant's background in science and knowledge of chemistry used to manufacture methamphetamine); *United States v. Culver*, 929 F.2d 389, 393 (8th Cir. 1991) (defendant's skills as a pilot used to facilitate conspiracy to transport a stolen plane). *We agree that such a direct use is required and it is not present here. Hickman simply took advantage of the trust engendered in a business-client relationship to misappropriate the MacEwan's money.*

Hickman, Ibid., at 1113. (Emphasis added).

The *Hickman* case is precisely analogous to the case at bar where Petitioner's insurance license was "merely the general business license required of a wide range of commercial enterprises." Following the Third Circuit's previous ruling in *Hickman*, Petitioner's business-client relationship is insufficient to establish the requisite "direct use" of a special skill "to actually commit or conceal the crime," and, therefore, the lower court erred in enhancing the offense level under U.S.S.G. § 3B1.3. *Ibid.*, at 1113.

For all of the foregoing reasons, the decision of the Third Circuit Court of Appeals in this case is in conflict with the decisions of numerous other United States Courts of Appeal as well as its own prior decision in *United States v. Hickman, Ibid.*

IV.

THE LOWER COURTS' FAILURE TO DISTINGUISH BETWEEN U.S.S.G. § 2S1.1 AND § 2S1.2 FOR PURPOSES OF DETERMINING THE "VALUE OF THE FUNDS" IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

The trial court included for purposes of calculating the "value of the funds" under U.S.S.G. § 2S1.2(b)(2) the total amount of the transfers charged in the indictment without deduction for legitimate expenses or insurances actually provided in the normal course of business pursuant to business practice established over the preceding thirteen years. The only case relied on by the district court is the case of *United States v. Thompson*, 40 F.3d 48 (3rd Cir. 1994), *cert denied*, 115 S. Ct. 1390 (1995). However, the *Thompson* case must be distinguished from the case at bar because the Thompson defendants were guilty of violations of 18 U.S.C. § 1956 and were sentenced pursuant to U.S.S.G. § 2S1.1. For the reasons set forth below, Petitioner believes that there is a significant distinction between the conduct proscribed in 18 U.S.C. § 1956 versus that proscribed in 18 U.S.C. § 1957, and, therefore, the determination of the "value of the funds" under U.S.S.G. § 2S1.1 and § 2S1.2 must differ accordingly.

In *Thompson*, the defendant's conduct was so far more egregious than in the instant case, that a different analysis of the amount of loss is warranted. In the *Thompson* case, the entire scheme was fraudulent — *i.e.* the diversion of the investor's funds to all of the accounts in fictitious names and aliases, to further the goals of the criminal enterprise. Each and every transfer charged in the money laundering counts represented a step in furtherance of laundering the proceeds of the stolen checks for the defendants *personal use*.

However, in the instant case, a review of Exhibit 5 — "Summary and Analysis of 'Money Laundering Transfers' " (60a) reveals transfers to related checking accounts of Universal, in furtherance of the legitimate business of Universal. Of the $505,650 charged as money laundering, $311,000 represents transfers to the Universal Claims Account which was used to pay health care providers for claims and premiums on insurances which Petitioner actually provided.[6] It is undisputed $124,283 was transferred to the Universal Claims Account for the payment of premiums for insurances provided (*i.e.* dental, vision, life, etc.) and $187,062.76 was transferred to the Universal Claims Account for the payment of uninsured medical claims of the employees. (19a). Further, Exhibit 5 shows that $43,900 was transferred to the Physical Fitness Account for payment of physical fitness center benefits. However, (trial) Exhibit 6 — "Physical Fitness Summary" demonstrates that, in fact, more money ($118,060) was deposited (from the FOP) into the Universal General Account than was transferred out ($95,000). An additional $120,500 was transferred to the Execucomp Inc. account[7], which was used to pay office overhead — *i.e.* rent, payroll, utilities, etc. It is important to note that this procedure of depositing income from all sources in the Universal General account, transferring money to the Universal Claims account for payment of claims and premiums, and transferring money to Execucomp, Inc. for payment of operational expenses, had been in effect for at least thirteen years.

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6. It is impossible to determine what part of this money represented Seafood Workers premiums, since at least $600,000 of legitimate deposits were made into the Universal account. Similarly, it is impossible to say what part of this $311,000 was used to pay Seafood workers claims as opposed to claims of other clients of Universal. However, Exhibit 7 shows that a total of $343,245.89 was paid out of Universal's accounts for claims and insurance premiums on behalf of Seafood workers.

7. Universal is a wholly owned subsidiary of Execucomp, Inc.

It is, therefore, respectfully submitted that the transfers here at issue, *i.e.* transfers between different checking accounts of the same entity for legitimate business purposes should be excluded from the calculation of the amount of loss under U.S.S.G. § 2S1.2. The fact that the *Thompson* court refused to exclude the amount of monies which had been frozen and returned to the investors does not preclude this result in the case at bar. In *Thompson,* the defendants stole and diverted checks to their own accounts and subsequently laundered the funds through a series of other accounts to conceal the nature of the transactions. The Third Circuit correctly concluded that the full amount of money involved, without deduction for amounts recovered, represents the "amount of loss" under U.S.S.G. § 2S1.1 because "the amount of money involved is . . . an indicator of the magnitude of the criminal enterprise and the extent to which the defendant aided the enterprise." *Thompson,* 40 F.3d at 51, *citing* U.S.S.G. § 2S1.1, Commentary. This rationale clearly is inapplicable to Petitioner Fluehr's conduct in transferring money within Universal for the payment of claims, overhead and legitimate insurances provided, as he had done as part of his normal business practice for thirteen years. The lower court's conclusion that premiums paid by Petitioner for the other insurances contracted for and provided to the employees should be included in the amount of the loss is simply preposterous and has the effect of rewarding crime because under that reasoning Petitioner would have been better off to pocket the money rather than provide what was contracted for.

Similarly, as discussed above, the lower court's reasoning with respect to the payment of uninsured medical expenses by Petitioner is contradictory to the court's own findings with respect to Petitioner's actions and lack of intent, and is unsupported by the testimony. Once again, to include this amount in the calculation of the amount of loss defies reason, as it punishes Petitioner for his attempt to make good on his error by

paying the claims. Had he kept the money for himself and left the claims unpaid, he would have been far better off under the lower court's reasoning.

Therefore, for all of the foregoing reasons, the following amounts should have been deducted from the amount of loss under U.S.S.G. § 2S1.2:

Amount Charged	$ 505,650.00
Less amounts transferred to:	
Claims Account	$ 311,000.00
Execucomp, Inc.	$ 120,500.00
Physical Fitness	$ 43,900.00
TOTAL AMOUNT OF LOSS	$ 30,250.00

The distinction between U.S.S.G. § 2S1.1 and § 2S1.2 for purposes of determining the "value of the funds" represents an important issue of federal law which should be decided by this Court. It is evident that the expressed congressional intent to punish persons involved in narcotics trafficking and money laundering under 18 U.S.C. § 1956, and the case law interpreting U.S.S.G. § 2S1.1 to include all monies transferred in the "value of the funds" under U.S.S.G. § 2S1.1, must be definitively distinguished from technical violations under 18 U.S.C. § 1957 and U.S.S.G. § 2S1.2.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully submits that a writ of certiorari should issue to review the judgment of the court below.

Respectfully submitted,

HOPE C. LEFEBER
Attorney for Petitioner
Suite 1000
1420 Walnut Street
Philadelphia, Pennsylvania 19102
(610) 668-7927

APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED DECEMBER 7, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1226

UNITED STATES OF AMERICA

v.

ROBERT J. FLUEHR,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 93-cr-00376-1)
District Judge: Hon. Thomas N. O'Neill, Jr.

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 1, 1995

Before: MANSMANN, and COWEN, *Circuit Judges*
PARELL*, *District Judge*

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit:

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* Honorable Mary Little Parell, United States District Judge, U.S. District Court for the District of New Jersey, sitting by designation.

Appendix A

1. Did the lower court err in applying the money laundering guidelines under U.S.S.G. § 2S1.2 rather than the mail fraud guidelines under U.S.S.G. § 2F.1, where:

A. The money laundering violations were atypical of the "heartland" of cases for which the guidelines were intended;

B. Money laundering did not represent the essence of the actual conduct which occurred or the "real offense"; and

C. The United States Sentencing Commission has recommended to Congress an amendment to the money laundering guidelines (U.S.S.G. § 2S1.1 and § 2S1.2) which evidences the fact that the instant case is beyond the "heartland" of cases for which the existing guidelines were intended;

2. Did the lower court err in including the total amount of loss charged in the indictment, without deduction for amounts paid for legitimate expenses which were transferred in the ordinary course of business, pursuant to business practice established over the previous 13 years;

3. Did the lower court err in increasing the offense level for knowledge of specified proceeds under U.S.S.G. § 2S1.2(b)(1)(B), where the court held that, as a matter of law, it was impossible to determine how much of the transferred funds originated from legitimate or tainted monies; and

4. Did the lower court err in increasing the offense level pursuant to U.S.S.G. § 3B1.3 for abuse of a position of trust where the government failed to prove that appellant occupied a position of trust with the victims; it is

Appendix A

ADJUDGED AND ORDERED that the judgment of the district court entered on March 22, 1995, be and is hereby affirmed.

ATTEST:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk
Dated: DEC 7, 1995

By the Court,

s/ Robert E. Cowen
CIRCUIT JUDGE

Certified a true copy and issued in lieu
of a formal mandate on December 29, 1995.

Teste: s/ P. Douglas Sisk
Clerk, United States Court
of Appeals for the Third Circuit

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED MARCH 17, 1995

UNITED STATES DISTRICT COURT
Eastern District of Pennsylvania

Case Number: 93-00376-01

UNITED STATES OF AMERICA

V.

ROBERT J. FLUEHR
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Hope Lefeber, Esq.
Defendant's Attorney

THE DEFENDANT

☑ pleaded guilty to count(s) *1-100, 102-190, 192-211, 212-238*

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

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Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:1341	*Mail fraud*	*4/28/93*	*1-100, 102-190 192-211*
18:2	*Aiding and abetting*	*4/22/93*	*1-100, 102-190 192-238*
18:1957	*Engaging in monetary transactions in property derived from specified unlawful activity*	*4/22/93*	*192-238*

The defendant is sentenced as provided in pages 2 through *4* of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ Count(s) *101 and 191* (is)(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of *$11,900.00*, for count(s) *1-100, 102-190, 192-238*, which shall be due ☐ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Appendix B

Defendant's Soc. Sec. No.: *205-34-4751*

Defendant's Date of Birth: *5/25/43*

Defendant's Mailing Address:

543 Fisher Lane
Warminster, PA 18974

Defendant's Residence Address:

same as above

March 17, 1995
Date of Imposition of Sentence

s/ *Thomas O'Neill*
Signature of Judicial Officer

THOMAS N. O'NEILL, JR., J.
Name & Title of Judicial Officer

3/21/95
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *33 months as to Counts 1-100, 102-190, 192-238 to run concurrently with the sentence on every other count.*

Appendix B

☒ The court makes the following recommendations to the Bureau of Prisons:

That the sentence be served at FCP-Fort Dix.

Defendant shall self surrender on April 18, 1995.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *2 years as to Counts 1-100, 102-190, 192-238 to run concurrent on each count.*

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

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☐ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITION OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer

Appendix B

any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix B

STATEMENT OF REASONS

☑ The court adopts the factual findings and guideline application in the presentence report.

* * *

Guideline Range Determined by the Court:

Total Offense Level: *21*

Criminal History Category: *I*

Imprisonment Range: *37 to 46 months*

Supervised Release Range: *2* to *3* years

Fine Range: *$7,500.00* to *$75,000.00*

☑ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

☑ Full restitution is not ordered for the following reason(s):

Inability to pay above previous agreement re: $30,000.00 to Wells Meats

OR

The sentence departs from the guideline range

Appendix B

☒ for the following reason(s):

Lack of moral culpability.

Extraordinary acceptance of responsibility

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED MARCH 14, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 93-00376-01

UNITED STATES OF AMERICA

v.

ROBERT J. FLUEHR

MEMORANDUM

O'Neill, J. March 14, 1995

On January 27, 1995, I issued a memorandum with respect to the sentencing of defendant. I requested briefing of the issues and objections raised by defendant at his sentencing hearing held on February 16, 1995.

Amendments to the January 27, 1995 Memorandum

The last sentence of the first full paragraph on page 3 of the January 27, 1995 memorandum will be amended to read as follows:

> $311,000 of these transfers were made to a sub-account entitled "claims" from which payments were made for uninsured claims

> submitted by the employees, premiums on insurance policies that were actually secured for the employees and claims submitted by other clients of UHM.

The following sentences will be inserted after the above amended sentence:

> Evidence was not presented regarding how much was transferred into the claims sub-account as a result of transfers out of the general account not in excess of $10,000. However it is known that $124,283 and $187,062.76 of the total amount transferred into the claims sub-account were used to pay respectively for premiums on insurance policies that were actually secured for the employees and for uninsured claims of the employees.

The second and third sentences of the first full paragraph on page 10 of the January 27, 1995 memorandum will be amended as follows:

> Of the $505,650 in transfers by the defendant in violation of § 1957, $311,000 was transferred into a sub-account from which payments were made for uninsured claims submitted by the employees, premiums on insurance policies that were actually secured for the employees and claims submitted by other clients of UHM. Approximately that amount ($124,283 + $187,062.76) was used

> to pay for uninsured claims submitted by the employees and for premiums on insurance policies that were actually secured for the employees. The payment of the uninsured claims and premiums on the insurance policies that were actually secured led those employees to believe that they did in fact have hospitalization, major medical and surgical insurance which allowed the defendant to continue receiving premium payments from them through the mails.

The first sentence of footnote 10 on page 10 of the memorandum of January 25, 1995 is amended as follows:

> It is impossible to determine exactly what amount of the $311,000 transferred to the claims account was used to pay claims submitted by the employees and premiums on insurance policies that were actually secured for the employees.

Effect of Amendments on Sentencing

In his sentencing brief defendant argued that under *United States v. Skinner*, 946 F.2d 176 (2d Cir. 1991) (holding that the "heartland" offense for which U.S.S.G. § 2.S1.1 is intended is one for which there is more than de minimis proof of actual encouragement or facilitation of further criminal activity) his case is atypical of the "heartland" offense for which U.S.S.G. § 2.S1.2 was intended because any transfer in excess of $10,000 out of the general account violated 18 U.S.C. § 1957 even if the transfer was for legitimate business purposes.

Appendix C

I held that § 2.S.1.2 was intended to cover violations of § 1957 without regard to whether there was more than de minimis proof of actual encouragement or facilitation of further criminal activity and noted that in any event there was more than de minimis proof in this case. *Memorandum* at 10-11.

I then determined that under § 2S.1.2(b)(2) the offense level should be increased by three offense levels because § 2S1.2 was intended to cover violations of § 1975 "without regard to whether the monetary transfer results in facilitating the underlying crime or concealment of the proceeds" and defendant's transfers in violation of § 1957 totalled $505,650. *Id.* at 11.

Defendant does not assert that the above amendments should disturb my finding that defendant's case is a "heartland" offense for which § 2S.1.2 was intended.[1] Defendant does however challenge my finding that $505,650 is the correct figure to be used in determining increases to the offense level pursuant to § 2S.1.2(b)(2).

Pursuant to § 2S.1.2(b)(2) if the value of the funds transferred in violated of § 1957 exceeds $100,000 the offense level should be increased a specified in § 2S.1.1(b)(2). Defendant argues that $505,650 was not the correct figure to be used in applying § 2S.1.2(b)(2) because certain transfers did not result in the furtherance of criminal activity.

---

1. Nor do I find that the amendments should disturb this determination because: (1) there is still more than de minimis proof of facilitation of further criminal activity; and (2) § 2S.1.2 was intended to cover violations of § 1957 without regard to whether the transfer resulted in facilitation of further criminal activity.

Appendix C

In *U.S. v. Thompson*, 40 F.3d 48 (3d Cir. 1994) defendant Thompson pled guilty to money laundering in violation of 18 U.S.C. § 1956. Thompson and a co-defendant engaged in a scheme which allowed them to steal a total of $352,220.50 which they deposited in accounts with PNC Bank. PNC became aware of Thomspon's activities and froze the accounts which prevented Thompson from withdrawing $99,561.27 which was returned to the victims of the scheme. *Id.* at 50. On appeal Thompson argued that it was improper for the district court to use $352,220.50 to calculate the offense level increase pursuant to § 2S.1.1(b)(2) because the $99,561.27 which was returned to the investors should not have been included in that figure. *Id.* at 51. The Court of Appeals rejected Thompson's argument and held that the proper figure to be used when calculating the offense level increase to § 2S.1.1(b)(2) is the total value of the funds involved in the scheme ($352,220.50) and not the amount of loss ($352,220.50 - $99,561.27). *Id.* at 52.

Defendant argues that this case is distinguishable from *Thompson* because in *Thompson* the transfers represented a step in furtherance of laundering the proceeds of stolen checks for personal use whereas in this case some of the transfers were for legitimate business purposes and did not result in the furtherance of criminal activity. In light of my determination that § 2S.1.2 was intended to cover transfers in violation of § 1957 regardless of the purpose of the transfer, this argument does not persuade me that the total value of the funds transferred ($505,650) should not be used in the application of § 2S.1.2(b)(2). *See Memorandum* at 11.[2]

---

2. Defendant argues that the following amounts should be deducted from the $505,650:

(Cont'd)

Appendix C

In the alternative defendant requests that I depart downwards because the figure of $505,650 overrepresents the defendant's conduct. Defendant argues that the overrepresentation results from the undisputed evidence that a large percentage of the funds in the general account were untainted. *See Memorandum at* 17.

I will deny departure on this grounds because I have already considered that a large percentage of the funds in the general account were untainted in granting a downward departure for acceptance of responsibility to a degree substantially greater than ordinarily present. *Id.*

(Cont'd)

(1) $124,283 which was paid out of the claims sub-account for premiums for insurance which was actually provided to the employees;

(2) $43,900 which was transferred to the Physical Fitness Account for payment of physical fitness center benefits which were provided;

(3) $120,500 which was transferred to a sub-account in order to pay for operational expenses; and

(4) $52,033.65 which was paid out of the claims sub-account for premiums on the insurance which was actually provided to Wells Meats employees.

See Defendant's Memorandum in Support of Exceptions at 4.

I note that even if it were proper to deduct from the total funds transferred those amounts that did not result in the furtherance of the mail fraud I would not deduct the $124,283 referred to above because the payment of those premiums helped to contribute to the employees belief that they did in fact have hospitalization, major medical and surgical insurance which allowed the defendant to continue receiving premium payments through the mail.

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 93-00376-01

UNITED STATES OF AMERICA

v.

ROBERT J. FLUEHR

ORDER

AND NOW this 14th day of March, 1995, upon consideration of defendant's exceptions to this Court's memorandum of January 27, 1995 and the government's response thereto it is hereby ORDERED that:

1. The last sentence of the first full paragraph on page 3 of the January 27, 1995 memorandum will be amended to read as follows:

> $311,000 of these transfers were made to a sub-account entitled "claims" from which payments were made for uninsured claims submitted by the employees, premiums on insurance policies that were actually secured for the employees and claims submitted by other clients of UHM.

2. The following sentences will be inserted after the above amended sentence:

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> Evidence was not presented regarding how much was transferred into the claims sub-account as a result of transfers out of the general account not in excess of $10,000. However it is known that $124,283 and $187,062.76 of the total amount transferred into the claims sub-account were used to pay respectively for premiums on insurance policies that were actually secured for the employees and for uninsured claims of the employees.

3. The second and third sentences of the first full paragraph on page 10 of the January 27, 1995 memorandum will be amended as follows:

> Of the $505,650 in transfers by the defendant in violation of § 1957, $311,000 was transferred into a sub-account from which payments were made for uninsured claims submitted by the employees, premiums on insurance policies that were actually secured for the employees and claims submitted by other clients of UHM. Approximately that amount ($124,283 + $187,062.76) was used to pay for uninsured claims submitted by the employees and for premiums on insurance policies that were actually secured for the employees. The payment of the claims and premiums on the insurance policies that were actually secured led those employees to believe that they did in fact have hospitalization, major medical and surgical

> insurance which allowed the defendant to continue receiving premium payments from them through the mails.

4. The first sentence of footnote 10 on page 10 of the memorandum of January 25,1995 is amended as follows:

> It is impossible to determine exactly what amount of the $311,000 transferred to the claims account was used to pay claims submitted by the employees and premiums on insurance policies that were actually secured for the employees.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JANUARY 27, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 93-00376-01

UNITED STATES OF AMERICA

v.

ROBERT J. FLUEHR

MEMORANDUM

O'Neill, J. January 27, 1995

Defendant has pled guilty to 211 counts of mail fraud in violation of 18 U.S.C. § 1341[1] and 27 counts of engaging in

---

1. 18 U.S.C. § 1341 provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly

(Cont'd)

monetary transactions in property derived from specified unlawful activity in violation of 18 U.S.C. § 1957.[2] A sentencing hearing was held on January 13, 1995.

Defendant was the president of Universal Health Management, Inc. which acts as an insurance broker and administers group health benefits. From 1980 to 1992 UHM provided psychological, podiatric, prescription, dental, vision, life and physical fitness plans. On July 16, 1992, defendant in his capacity as president of UHM entered into an agreement with the Wholesale Seafood Dealers of Philadelphia to secure various types of insurance including hospitalization, surgical and major medical insurance for Seafood employees.[3] Coverage for the

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(Cont'd)

> causes to be delivered by mail according to direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing . . . [shall be fined and/or imprisoned].

2. 18 U.S.C. § 1957(a) provides:

> Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity shall be punished as provided in subsection (b).

3. The agreement specified that hospitalization would be placed with Blue Cross and that surgical and major medical would be placed with Confederation Life. Confederation Life was not in the business of issuing surgical or major medical insurance.

Seafood employees was to start on July 1, 1992. In October 1992 and January 1993 defendant entered into similar types of agreements with George Wells Meat Company and Twin Brothers Meat.[4]

Defendant failed to obtain hospitalization, surgical, and major medical insurance for the employees,[5] but continued to accept premiums from the employees and misrepresented to a Seafood representative that those types of insurance had in fact been secured.[6] From July 1992 until April 1993 UHM deposited premiums collected from the employees in an amount of $540,361.38 into a general account. The total amount of deposits into the general account for this same period was $1,140,716.31. The result was that "tainted" funds collected from the employees were commingled with "untainted" funds collected from other clients of UHM.

For thirteen years the general practice of UHM was to transfer funds every month out of the general account into sub-accounts to meet its various obligations. From August 1992 through May 1993 there were twenty seven transfers in excess of

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4. The term "employees" will refer to the all of the employees of Seafood, Twin Brothers and Wells who were to be covered by the agreements.

5. Defendant did secure the other types of insurance which were specified in the contracts.

6. Prior to and after entering into the agreements defendant did — although unsuccessfully — make efforts to place the hospitalization, surgical, and major medical insurance. In February 1992 defendant was able to obtain "stop loss reinsurance" for Wells which was much less preferable than the type of insurance that had been promised.

$10,000 out of the general account. The total value of these transfers was $505,650. $311,000 of these transfers were made to a sub-account entitled "claims" from which payments were made for uninsured claims submitted buy the employees and for claims submitted by other clients of UHM.

In the revised presentence report the probation officer pursuant to U.S.S.G. § 3D1.2 grouped all of the counts charging defendant with mail fraud in violation of 18 U.S.C. § 1341 with the counts charging monetary transactions in property derived from specified unlawful activity in violation of 18 U.S.C. § 1957. Pursuant to U.S.S.G. § 3D1.3(a) the offense level for the group is to be determined by applying the sentencing guidelines to the most serious of the counts in the group which in this case are those charging violations of 18 U.S.C. § 1957. Under the sentencing guidelines the offense level for violations of 18 U.S.C. § 1957 is determined by looking to U.S.S.G. § 2S1.2.

Pursuant to 18 U.S.C. § 3553(b) a court may depart from the guidelines if it finds a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Guidelines, that should result in a sentence different than that described [in the guidelines]." Chapter 5, Part K of the Guidelines, identifies specific factors which could not be adequately considered in formulating the Sentencing Guidelines, but also states that by their very nature circumstances that may warrant a departure cannot be "comprehensively listed and analyzed in advance." U.S.S.G. § 5K2.0. The Introduction to the Sentencing Guideline explains that the sentencing court should consider "each guideline as carving out a 'heartland', a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline applies but

where conduct significantly differs from the norm, the court may consider whether a downward departure is warranted." U.S.S.G. Ch. 1, Part A, 4(b).

Defendant argues that in determining the appropriate offense level the Court should depart downwards and look to U.S.S.G. § 2F1.1 which is the sentencing guideline applicable to violations of 18 U.S.C. § 1341 instead of U.S.S.G. § 2S1.2 because: (1) the violations of 18 U.S.C. § 1957 do not represent the essence of the actual conduct which occurred or the "real" offense; and (2) defendant's violations of 18 U.S.C. § 1957 are outside of the "heartland" of cases for which U.S.S.G. § 2S1.2 was intended.

In *United States v. Liebermann*, 971 F.2d 989 (3d Cir. 1992) defendant was convicted of embezzlement and also of tax evasion with respect to the same money he had embezzled. The district court concluded that the embezzlement and tax evasion charges could not be grouped which resulted in an offense level two levels greater than if the defendant had been charged only with tax evasion. It then stated that it had never seen a defendant charged with embezzlement and tax evasion for the same embezzled moneys and that it was an inappropriate manipulation of the indictment to do so. To correct for the inappropriate manipulation the district court departed downwards by two levels and the Court of Appeals affirmed.

The Court of Appeals held that a sentencing court has the authority to downward depart from the guidelines based on an inappropriate manipulation of the indictment, because otherwise the "prosecutor [would be raised] to a position supreme over the district judge vis-a-vis sentencing by virtue of

the uncontrolled charging discretion."[7] *Id.* at 998. It also approved the amount of departure because it was based on a "reference to an applicable counterpart in the Guidelines" which in that case was the two-level increase effected by the failure to group. *Id.* at 999.

Defendant argues that *Lieberman* stands for the proposition that where the "real" offense (embezzlement or as in this case mail fraud) has a lower sentencing guideline than another "charged" offense in the indictment (tax evasion or as in this case monetary transfers in violation of § 1957) the sentencing court should depart downwards and apply the sentencing guideline for the "real" offense (mail fraud). Reliance on *Lieberman* is appropriate only if defendant can show that it was an inappropriate manipulation of the indictment to charge him with both mail fraud and violations of § 1957 with respect to the same money received from the mail fraud.

As the *Liebermann* court explained inappropriate manipulation can result from "prosecutorial zeal that results in charging a particular defendant disproportionately to others similarly situated." *Id.* at 998. Defendant has not been charged disproportionately to others similarly situated because: (1) those who are charged only with violations of § 1957 are no better off than defendant because grouping has been applied in this case; and (2) he had not shown that similarly situated persons are usually charged only with mail fraud. Finally, because I do not find other grounds upon which it can be said that there was an inappropriate manipulation of the indictment, *Lieberman* does not justify a departure in this case.

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7. The issue of whether the charges should have been grouped was not addressed.

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Defendant cites *United States v. Malfrici*, No. 92 Cr. 1049, 1993 WL 127196 (S.D.N.Y. Apr. 21, 1993) in support of the assertion that his conduct does not represent the "heartland" offense that U.S.S.G. § 2S1.2 was intended to cover. In *Malfrici* the defendant was a banker who was convicted of embezzlement and money laundering pursuant 18 U.S.C. § 1956(a)(1)(B)(i).[8] Initially the court applied the sentencing guidelines applicable to the money laundering conviction. It subsequently decided that the defendant's conduct did not constitute a "heartland" offense and that the embezzlement guidelines were more appropriate because § 1956 was aimed only at those who launder the proceeds of the unlawful activity of others and not at those who launder the proceeds of their own unlawful activity. The *Malfrici* court reasoned that "bank embezzlers commonly conduct financial transactions transferring from one account to another the proceeds of their own 'unlawful conduct.' " *Id.* at *1.

Title 18 U.S.C. §§ 1956 and 1957 were passed as part of the Money Laundering Act of 1986. Although the Act was part of an effort to criminalize the conduct of third persons who aided in the disposing of proceeds of unlawful activity, "the Act itself

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8. § 1956(a)(1)(B)(i) provides in part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity — . . . (B) knowing that the transaction is designed in whole or in part — (i) to conceal or disguise the nature, location, the source, the ownership, or the control of the proceeds of unlawful activity . . . [shall be sentenced to a fine or imprisonment].

prohibits a much broader range of conduct than just the 'classic' example of money laundering." *United States v. Johnson*, 971 F.2d 562, 568-69 (10th Cir. 1992). As the Act covers more than just the classic case of money laundering and I have not found any authority in support of the proposition that U.S.S.G. § 2S1.2 was only intended to cover cases in which the defendant was engaging in a transaction with the proceeds of another's unlawful activity, I decline to apply *Malfrici* to the present case. Defendant also contends that this case is atypical of the "heartland" of cases for which U.S.S.G. § 2S1.2 was intended because any transfer in excess of $10,000 out of the general account violated § 1957 even if the transfer was for legitimate business purposes.

In *Unites States v. Skinner*, 946 F.2d 176 (2d Cir. 1991), defendants Blodgett and Skinner engaged in a conspiracy to distribute cocaine. From July to August of 1989 Blodgett sent cocaine from Alaska to Skinner in Vermont. Skinner sold the cocaine and use the proceeds of the sales to purchase money orders totalling $3,320, which she would then send to Blodgett in Alaska. Blodgett returned to Vermont in late August and began selling to Skinner in Vermont. The total amount of cocaine sold by Blodgett to Skinner from July to October of 1989 was 120 grams. Both defendants were convicted of conducting a financial transaction with proceeds of unlawful activity in violation of 18 U.S.C. § 1956(a)(1)(A)(i).[9]

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9. § 1956(a)(1)(A)(i) provides in pertinent part that:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact

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The defendants challenged their convictions under § 1956 arguing that the section was not intended to convert simple payment for illegal drugs into an independent offense. The *Skinner* court rejected this argument noting that although the payment in this case differed from classic money laundering the language used by Congress showed that it intended to make unlawful a broad array of transactions.

The commentary to U.S.S.G. § 2S1.1 — the sentencing guideline for § 1956 — states that the base offense level for defendants who violate § 1956 with the intent to further facilitate the underlying unlawful activity is higher than the level for defendants who commit other violations of § 1956 because the former "encouraged or facilitated the commission of further crimes." Relying on this language the *Skinner* court concluded that the defendants offense was atypical of the "heartland" case for which the guideline was intended because the proof of actual encouragement or facilitation of further criminal activity was de minimis. The proof was de minimis because: (1) the transactions in reality only represented the completion of the sale from Blodgett to Skinner; and (2) the only argument that the Government had put forward in support of further promotion was that the receipt of the proceeds allowed Skinner to continue receiving cocaine from Blodgett through the mail, but Blodgett returned from Alaska in August and began selling directly to Skinner.

I note that if the reasoning in *Skinner* is applicable to cases

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> involves the proceeds of specified unlawful activity — (A)(i) with the intent to promote the carrying on of specified unlawful activity . . . [shall be sentenced to a fine or imprisonment].

involving § 1957 defendant's case is such a "heartland" case because there is more than de minimis evidence that the monetary transfers resulted in the facilitation of further criminal activity. Of the $505,650 in transfers by the defendant in violation of § 1957, $311,000 was transferred to a sub-account for claims submitted by employees who were not covered by insurance and by other clients of UHM and approximately that amount was paid out on the claims of the uninsured employees. The payment of the claims led those employees to believe that they did in fact have hospitalization, major medical and surgical insurance which allowed the defendant to continue receiving premium payments from them through the mails.[10]

I also decline to extend the reasoning of *Skinner* to U.S.S.G. § 2S1.2 because the commentary to that section states that:

> [Title 18 U.S.C. § 1957] is similar to 18 U.S.C. § 1956, but does not require that the recipient exchange or 'launder' the funds, that he have knowledge the funds were proceeds of a specific unlawful activity, nor that he have any intent to further or conceal such an activity.

U.S.S.G. § 2S1.2 commentary (background) (emphasis added). Assuming that the "heartland" case that U.S.S.G. § 2S1.1 was intended to cover was a violation of § 1956 and of which there is more than de minimis evidence that the transaction resulted in the promotion of the underlying unlawful activity or in the

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10. It is impossible to determine exactly what amount of the $311,000 transferred to the claims account was used to pay claims submitted by the employees. However there is enough evidence to establish that a significant amount was used.

concealment of ill-gotten gains, the language quoted above reveals that U.S.S.G. § 2S1.2 was intended to cover even those violations of § 1957 which do not result in the laundering of funds or the furtherance of the underlying criminal activity. Therefore, the fact that portions of the money were transferred to cover legitimate business expenditures does not render defendant's violations of § 1957 atypical.

The probation officer recommends an increase of three offense levels pursuant to § 2S.1.2(b)(2) because defendant's transfers in violation of § 1957 total $505,650. Defendant contends that the full amount of $505,650 should not be used in the calculation because most of these transfers were in furtherance of UHM's legitimate business purposes. This argument must be rejected as I have concluded that U.S.S.G. § 2S1.2 was intended to cover violations of § 1975 without regard to whether the monetary transfer results in facilitating the underlying crime or concealment of the proceeds.

The probation officer recommends an increase of two offense levels pursuant to § 2S1.2(b)(1)(B) because defendant knew that the funds involved in the monetary transfers were the proceeds of an unlawful activity specified in § 1956(c)(7). Defendant argues that this increase is improper because as a result of the commingling of the funds the defendant could not have known the specific source of the funds transferred.

Defendant has pled guilty to § 1957 one element of which is knowledge that the funds were proceeds of unlawful activity and the only unlawful activity which defendant was conducting at the time was mail fraud in violation of 18 U.S.C. § 1341.[11] This is

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11. 18 U.S.C. § 1341 is a specified unlawful activity described in 18 U.S.C. § 1956(c)(7).

sufficient evidence to show defendant's knowledge that each transfer consisted of proceeds from the mail fraud. Therefore the offense level is properly increased by two levels pursuant to § 2S1.2(b)(2).

The Court will adopt the probation officer's recommendation that the offense level be increased by two levels pursuant to U.S.S.G. § 3B1.3 because the defendant abused a position of trust in a manner that significantly facilitated the commission of concealment of the offense.

Defendant requests that the Court grant a downward departure pursuant to U.S.S.G. § 5K2.13[12] because his capacity to make reasoned decisions during the time in which his offenses were committed was severely diminished by psychological disorders from which he suffers and several family hardships which occurred in the same time period. There was expert testimony given at defendant's sentencing hearing to the effect that defendant suffers from obsessive-compulsive personality disorder which results in his having strong tendencies towards procrastination and avoiding details and finishing projects. The experts also testified that at the time defendant committed the offenses to which he has pled guilty the family hardships he

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12. U.S.S.G. § 5K2.13 provides as follows:

> If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

experienced caused him to suffer from dysthymia (depressive disorder) which only exacerbated his obsessive-compulsive personality disorder.

It is regrettable that defendant has endured all of these hardships. However, I do not find that those hardships coupled with his tendencies towards procrastination and the avoiding of details and finishing projects diminished his mental capacity to such a degree that would warrant a departure from the sentencing guidelines.

A mitigating circumstance is one which "somehow reduces the defendant's guilt or culpability. It is a circumstance that 'in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability.' " *United States v. Monaco*, 23 F.3d 793, 802 (3d Cir. 1994) (citations omitted). Defendant argues that he lacked moral culpability to such an extent which would warrant a departure from the sentencing guidelines.

As evidence of his lack of moral culpability defendant points to the following: (1) defendant has never before engaged in criminal conduct; (2) defendant paid the employees' medical claims in an attempt to redress his failure to obtain insurance; and (3) as shown by his efforts to place the insurance with at least fourteen different insurance carriers, defendant always intended to obtain the unsecured insurance.

After considering the evidence I find that defendant did not embark on his relationship with the employees with an intent to defraud them and that he intended to secure insurance for them. This is a circumstance which in my judgement reduces defendant's moral culpability to a degree which warrants a departure from the guidelines and therefore I will depart downwards by one level.

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The probation officer recommends that the offense level be reduced by three levels pursuant to U.S.S.G. §§ 3E1.1(a) and (b) because of defendant's acceptance of responsibility. Defendant requests that the Court downward depart from this reduced level pursuant to § 5K2.0 because defendant accepted responsibility to a degree not adequately taken into account in the sentencing guidelines. The degree of acceptance of responsibility must be substantially in excess of that ordinarily present. *Liebermann*, 971 F.2d at 996.

As evidence that his acceptance of responsibility is substantially greater than the degree which is ordinarily present defendant points to the following facts: (1) prior to the F.B.I. investigation of his offices on May 6, 1994, defendant had already made payments to redress his wrongdoing; (2) during the period starting from when his office was investigated until the day of his indictment defendant paid restitution in the amount of approximately $32,000; (3) as of January 10, 1995 defendant has paid an additional amount of $89,419.22 in restitution; (4) defendant entered into an open plea agreement to all 238 counts of the Indictment without even a written plea agreement; and (5) defendant has entered into a forfeiture agreement with the government pursuant to which he will forfeit additional assets.

The payments made prior to the F.B.I. investigation do not demonstrate more than a minimal degree of acceptance of responsibility by the defendant because as discussed above the result of those payments was that the employees mistakenly believed that they were insured causing them to continue sending premiums to the defendant. However, I find that there are facts in this case which demonstrate that defendant has accepted responsibility to a degree substantially greater than that ordinarily present which would justify a downward departure

below the three level reduction which will be given pursuant to U.S.S.G. §§ 3E1.1(a) and (b).

One element of a § 1957 violation is that the funds transferred did in fact come from unlawful activities specified in § 1957(f)(2).[13] As mentioned above, the $505,650 of transfers in violation of § 1957 came out of a general account into which a total of $1,140,716.31 was deposited during the relevant period. Of this total amount $540,361.38 represents premiums paid by the uninsured employees (the "tainted" funds) and the remaining $600,000 (the "untainted" funds) was paid by other clients of UHM. Because the tainted and untainted funds were commingled it is impossible to know how much of any transfer out of the general account was of tainted funds.[14]

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13. § 1957 (f)(3) refers to § 1956 for definition of specified unlawful activity.

14. The government asserts that as a matter of law all of the funds involved in the twenty seven transfers in excess of $10,000 were in fact proceeds of specified unlawful activity because: (1) the funds were commingled; and (2) the $540,361.38 of premiums paid by the employees exceeds the total amount of those 27 transfers — $505,650. I do not find that *United States v. Thompson*, 40 F.3d 48 (3d Cir. 1994), which the government cites in support of this proposition, is controlling on this issue because in that case the Court addressed only the issue of whether the total value of the funds transferred or the total loss to the victims of the underlying criminal activity should be used in calculating an offense level increase pursuant to U.S.S.G. § 2S1.1(b)(2) and not the issue of whether as a matter of law commingling result in a presumption that all of the funds transferred are from an unlawful activity.

In *United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992), the defendant was tried and convicted of several violations of § 1957. On appeal the defendant challenged the sufficiency of the evidence because 1.2% of the funds in the

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The evidence presented indicates that it was the usual business practice of UHM to deposit all money received, regardless of the source, into the general account and that, therefore, the commingling of the tainted and untainted funds was not done with the intent to disguise how much of each transfer out of the general account consisted of tainted funds. The evidence is sufficient to prove defendant's guilt with respect to all twenty seven transfers; however, his lack of intent to disguise and the undisputed evidence that a large percentage of the funds in the general account were untainted demonstrates that his entering into an open plea agreement to all 238 counts of the indictment without even a written plea agreement and his making substantial restitution in the amount of $121,419.22[15] was an acceptance of responsibility substantially in excess of that ordinarily present. Accordingly, I will downward depart one level below the three level reduction to be given pursuant to U.S.S.G. §§ 3E1.1(a) and (b).

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account out of which he made transfers could not be proven to have come from unlawful activity. The *Johnson* court held that the burden on the government was to prove only that the funds transferred were in fact derived from specified activity and not that the funds could not have possibly come from any other source than a specified unlawful activity; otherwise, a defendant could avoid prosecution simply by commingling. *Id.* at 570. Although the *Johnson* court did not specifically address the issue, its discussion of the sufficiency of evidence suggests that it might well hold that the government would not be entitled to the presumption asserted by it in this case. In other words, the *Johnson* court could have easily disposed of that issue by holding simply that where funds are commingled the government is entitled to the presumption that funds transferred out of account are from specified unlawful activity.

15. This represents the total amount paid from the date of the F.B.I. search to January, 10, 1995.

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Finally, defendant requests that the Court depart downwards because even if each reason cited above (diminished capacity, extraordinary acceptance or responsibility, lack of moral capability) is not in and of itself legally sufficient to justify a downward departure a consideration of a combination of those factors would justify a downward departure. Defendant's request is moot in light of my decision to depart downwards based on two of the reasons cited above.

APPENDIX E — RELEVANT STATUTORY PROVISIONS

PART S - MONEY LAUNDERING AND MONETARY TRANSACTION REPORTING

§2S1.1. *Laundering of Monetary Instruments*

(a) Base Offense Level:

(1) **23**, if convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A):

(2) **20**, otherwise.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 3 levels.

(2) If the value of the funds exceeded $100,000, increase the offense level as follows:

Value (Apply the Greatest)		Increase in Level
(A)	100,000 or less	no increase
(B)	More than $100,000	add 1
(C)	More than $200,000	add 2
(D)	More than $350,000	add 3
(E)	More than $600,000	add 4
(F)	More than $1,000,000	add 5
(G)	More than $2,000,000	add 6
(H)	More than $3,500,000	add 7

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(I)	More than $6,000,000	add 8
(J)	More than $10,000,000	add 9
(K)	More than $20,000,000	add 10
(L)	More than $35,000,000	add 11
(M)	More than $60,000,000	add 12
(N)	More than $100,000,000	add 13

(c) Special Instruction for Fines - Organizations

(1) In lieu of the applicable amount from the table in subsection (d) of § 8C2.4 (Base Fine), use:

(A) The greater of $250,000 or 100 percent of the value of funds if subsections (a)(1) and (b)(1) are used to determine the offense level; or

(B) the greater of $200,000 or 70 percent of the value of the funds if subsections (a)(2) and (b)(1) are used to determine the offense level; or

(C) the greater of $200,000 or 70 percent of the value of the funds if subsection (a)(1) but not (b)(1) is used to determine the offense level; or

(D) the greater of $150,000 or 50 percent of the value of the funds if subsection (a)(2) but not (b)(1) is used to determine the offense level.

Appendix E

Commentary

Statutory Provision: *18 U.S.C. § 1956.*

Background: *The statute covered by this guideline is a part of the Anti-Drug Abuse Act of 1986, and prohibits financial transactions involving funds that are the proceeds of "specified unlawful activity," if such transactions are intended to facilitate that activity, or conceal the nature of the proceeds or avoid a transaction reporting requirement. The maximum term of imprisonment authorized is twenty years.*

In keeping with the clear intent of the legislation, this guideline provides for substantial punishment. The punishment is higher than that specified in § 2S1.2 and § 2S1.3 because of the higher statutory maximum, and the added elements as to source of funds, knowledge, and intent.

A higher base offense level is specified if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A) because those subsections apply to defendants who encouraged or facilitated the commission of further crimes. Effective November 18, 1988, 18 U.S.C. § 1956(a)(1)(A) contains two subdivisions. The base offense level of 23 applies to § 1956(a)(1)(A)(i) and (ii).

The amount of money involved is included as a factor because it is an indicator of the magnitude of the criminal enterprise, and the extent to which the defendant aided the enterprise. Narcotics trafficking is included as a factor because of the clearly expressed Congressional intent to adequately punish persons involved in that activity.

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Historical Note: Effective November 1. 1987. Amended effective November 1, 1989 (*see* Appendix C, amendments 212-214); November 1, 1991 (*see* Appendix C, amendments 378 and 422).

§ 2S1.2. Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity

(a) Base Offense Level: 17

(b) Specific Offense Characteristics

(1) If the defendant knew that the funds were the proceeds of:

(A) an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 5 levels; or

(B) any other specified unlawful activity (*see* 18 U.S.C. § 1956 (c)(7)), increase by 2 levels.

(2) If the value of the funds exceeded $100,000, increase the offense level as specified in § 2S1.1(b)(2).

(c) Special Instruction for Fines - Organizations

(1) In lieu of the applicable amount from the table in subsection (D) of § 8C2.4 (Base Fine), use:

(A) the greater of $175,000 or 60 percent of the

value of the funds if subsection (b)(1)(A) is used to determine the offense level; or

(B) the greater of $150,000 or 50 percent of the value of the funds if subsection (b)(1)(B) is used to determine the offense level.

Commentary

Statutory Provisions: *18 U.S.C. § 1957. For additional statutory provision(s), see Appendix A (Statutory Index).*

Application Note:

1. *"Specified unlawful activity" is defined in 18 U.S.C. § 1956(c)(7) to include racketeering offenses (18 U.S.C. § 1961(1)), drug offenses, and most other serious federal crimes but does not include other money-laundering offenses.*

Background: *The statute covered by this guideline is a part of the Anti-Drug Abuse Act of 1986, and prohibits monetary transactions that exceed $10,000 and involve the proceeds of "specified unlawful activity" (as defined in 18 U.S.C. § 1956), if the defendant knows that the funds are "criminally derived property." (Knowledge that the property is from a specified unlawful activity is not an element of the offense.) The maximum term of imprisonment specified is ten years.*

The statute is similar to 18 U.S.C. § 1956, but does not require that the recipient exchange or "launder" the funds, that he have knowledge that the funds were proceeds of a specified unlawful activity, nor that he have any intent to further or

conceal such an activity. In keeping with the intent of the legislation, this guideline provides for substantial punishment. The offense levels are higher than in § 2S1.3 because of the higher statutory maximum and the added element of knowing that the funds were criminally derived property.

The 2-level increase in subsection (b)(1)(B) applies if the defendant knew that the funds were not merely criminally derived, but were in fact the proceeds of a specified unlawful activity. Such a distinction is not made in § 2S1.1, because the level of intent required in that section effectively precludes an inference that the defendant was unaware of the nature of the activity.

§ 3B1.3. Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under § 3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under § 3B1.1 (Aggravating Role).

18 U.S.C. § 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity —

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part —

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States —

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity

and knowing that such transportation, transmission, or transfer is designed in whole or in part —

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than not more than[1] $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent —

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State of Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer of by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3) or (a)(3)[1], or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of —

(1) the value of the property, funds, or monetary instruments involved in the transaction; or

(2) $10,000.

(c) As used in this section —

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" has the definition given that term in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder;

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(7) the term "specified unlawful activity" means —

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31:

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving —

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) kidnapping, robbery, or extortion; or

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978))[1];

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities),

section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 875 (relating to interstate communications), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to fraudulent Federal Deposit Insurance transactions 1014 (relating to fraudulent loan or credit applications), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1201 (relating to kidnapping), section 1203 (relating to hostage taking), section 1708 (theft from the mail), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2319 (relating to copyright infringement), or section 2320 (relating to trafficking in counterfeit goods and services) of this title, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to

violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food Stamp Act of 1977 (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, or any felony violation of the Foreign Corrupt Practices Act; or

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.).

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service.

Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if—

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary; instruments of a value exceeding $10,000.

(g) Notice of Conviction of financial institutions. — If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

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(Added Pub.L. 99-570, Title XIII, § 1352(a), Oct. 27, 1986, 100 Stat. 3207-18 and amended Pub.L. 100-690, Title VI, §§ 6183, 6465, 6566, 6469(a)(1), 6471(a), (b), Title VII, § 7031, Nov. 18, 1988, 102 Stat. 4354, 4375, 4377, 4378, 4398; Pub. L. 101-647, Title I, §§ 105-108, Title XII, § 1205(j), Title XIV, §§ 1402, 1404, Title XXV, § 2506, Title XXXV, § 3557. Nov. 29, 1990, 104 Stat. 4791, 4792, 4831, 4835, 4862, 4927; Pub. L. 102-550, Title XV, §§ 1504(c), 1524, 1526(a), 1527(a), 1530, 1531, 1534, 1536, Oct. 28, 1992, 106 Stat. 4055, 4064-4067; Pub. L. 103-322, Title XXXII, § 320104(b), Title XXXIII, §§ 330008(2), 330011(1), 330012, 330019, 33021(1), Sept. 13, 1994, 108 Stat. 2111, 2142, 2145, 2146, 2149, 2150; Pub.L. 103-325, Title IV, §§ 411(c)(2)(E), 413(c)(1), (d), Sept. 23, 1994, 108 Stat. 2253, 2254, 2255.

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1. So in original.

EDITORIAL NOTES

References in Text. Section 7201 or 7206 of the Internal Revenue Code of 1986, referred to subsec. (a)(1)(A), is section 7201 or 7206 of Title 26, Internal Revenue Code.

Paragraph 7 of section 1(b) of the International Banking Act of 1978, referred to in subsec. (c)(7)(B), is par. (7) of section 1(b) of Pub.L. 95-369, Sept. 17, 1978, 92 Stat. 607, which is classified to section 3101(7) of Title 12, Banks and Banking.

The Controlled Substances Act, referred to in subsec. (c)(7)(B), is Title II of Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I (section 801 et seq.) of chapter 13 of Title 21, Food and Drugs. Section 422 of that Act, referred to in subsec. (c)(7)(D), is

classified to section 863 of Title 21. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

The Chemical Diversion and Trafficking Act of 1988, referred to in Subsec. (c)(7)(D), is Pub.L. 100-690, Title VI, §§ 6051 to 6061, Nov. 18, 1988, 102 Stat. 4312 to 4320. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21, Food and Drugs, and Tables.

Section 15 of the Food Stamp Act of 1977, referred to in subsec. (c)(7)(D), is section 15 of Pub.L. 88-525, Aug. 31, 1964, 78 Stat. 705, as amended, which is classified to section 2024 of Title 7, Agriculture.

The Foreign Corrupt Practices Act, referred to in subsec. (c)(7)(D), probably means the Foreign Corrupt Practices Act of 1977, Pub.L. 95-213; Title I, Dec. 19 , 1977, 91 Stat. 1494 to 1498, which enacted sections 78dd-1 and 78dd-2 of Title 15, Commerce and Trade, and amended sections 78m and 78ff of Title 15. For complete classification of this Act to the Code, see section 101 of Pub.L. 95-213, set out as a Short Title of 1977 Amendment note under section 78a of Title 15 and Tables.

The Federal Water Pollution Control Act, referred to in subsec. (c)(7)(E), is Act June 30, 1948, c. 758, as amended generally by Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 816, which is classified generally to chapter 26 (section 1251 et seq.) of Title 33, Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

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The Ocean Dumping Act, also known as the Marine Protection Research and Sanctuaries Act of 1972, referred to in subsec. (c)(7)(E), is Pub.L. 92-532, Oct. 23, 1972, 86 Stat. 1052, as amended, which is classified principally to chapter 27 (section 1401 et seq.) of Title 33, Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title note set out under section 1401 of Title 33 and Tables.

The Act to Prevent Pollution from Ships, referred to in subsec. (c)(7)(E) is Pub.L. 96-478, Oct. 21, 1980, 94 Stat. 2297. For complete classification of this Act to the Code, see Short Title note set out under section 1901 of Title 33, Navigation and Navigable Waters and Tables.

The Safe Drinking Water Act, referred to in subsec. (c)(7)(E), is Pub.L. 93-523, Dec. 16, 1974, 88 Stat. 1660 ,as amended, which is classified principally to subchapter XII (section 300f et seq.) of chapter 6A of Title 42. The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title of 1974 Amendments note set out under section 201 of Title 42 and Tables.

The Resources Conservation and Recovery Act of 1976, referred to in subsec. (c)(7)(E), is Pub.L. 94-580. Oct. 21, 1976, 90 Stat. 2796, as amended, which is classified generally to chapter 82 (§ 6901 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 6901 of this title and Tables.

Effective Date of 1994 Amendments. Section 413(d) of Pub.L. 103-325 provided in part that the amendment made by such section, repealing section 3557(2)(E) of Pub.L. 101-647 (which amended this section), was to take effect on the date of

enactment of section 3557(2)(E) of Pub.L. 101-647, which was approved Nov. 29, 1990.

Section 330011(*l*) of Pub.L. 103-322 provided in part that the amendment made by such section, repealing section 3557(2)(E) of Pub.L. 101-647 (which amended this section), was to take effect on the date of enactment of section 3557(2)(E) of Pub.L. 101-647, which was approved Nov. 29, 1990.

Effective Date of 1992 Amendments. Except as otherwise provided, amendment by Pub.L. 102-550 effective Oct. 28, 1992, see section 2 of Pub.L. 102-550, set out as a note under section 5301 of Title 42, The Public Health and Welfare.

Repeals. Section 3557(2)(E) of Pub.L. 101-647, set out in the credit to this section, was repealed by section 330011(*l*) of Pub. L. 103-322 and also repealed by section 413(d) of Pub.L. 103-325.

18 U.S.C. § 1957. Engaging in monetary transactions in property derived from specified unlawful activity.

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are —

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General.

(f) As used in this section —

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

(Added Pub.L. 99-570, Title XIII, § 1352(a), Oct. 27, 1986, 100 Stat. 3207-21, and amended Pub.L. 100-690, Title VI, §§ 6182, 6184, 6469(a)(2), Nov. 18, 1988, 102 Stat. 4354, 4377; Pub.L. 102-550, Title XV, §§ 1526(b), 1527(b), Oct. 28, 1992, 106 Stat. 4065; Pub.L. 103-322, Title XXXIII, § 330020, Sept. 13, 1994, 108 Stat. 2149; Pub.L. 103-325, Title IV, § 413(c)(2), Sept. 23, 1994, 108 Stat. 2255).

APPENDIX F — EXHIBIT 1 - DEPOSIT BREAKDOWN IN UNIVERSAL GENERAL'S CHECKING ACCOUNT

(Omitted here but submitted separately as Lodging Appendix.)

APPENDIX G — EXHIBIT 4 - MONEY LAUNDERING TRANSFERS

(Omitted here but submitted separately as Lodging Appendix.)

APPENDIX H — EXHIBIT 5 - SUMMARY AND ANALYSIS OF MONEY LAUNDERING TRANSFERS

(Omitted here but submitted separately as Lodging Appendix.)